



E-COMMERCE AND COMPETITION LAW

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Why should competition authorities be concerned with the rise of e-Commerce?



Source: Alex Chisholm
(then UK CMA Chief
Executive), December
2014

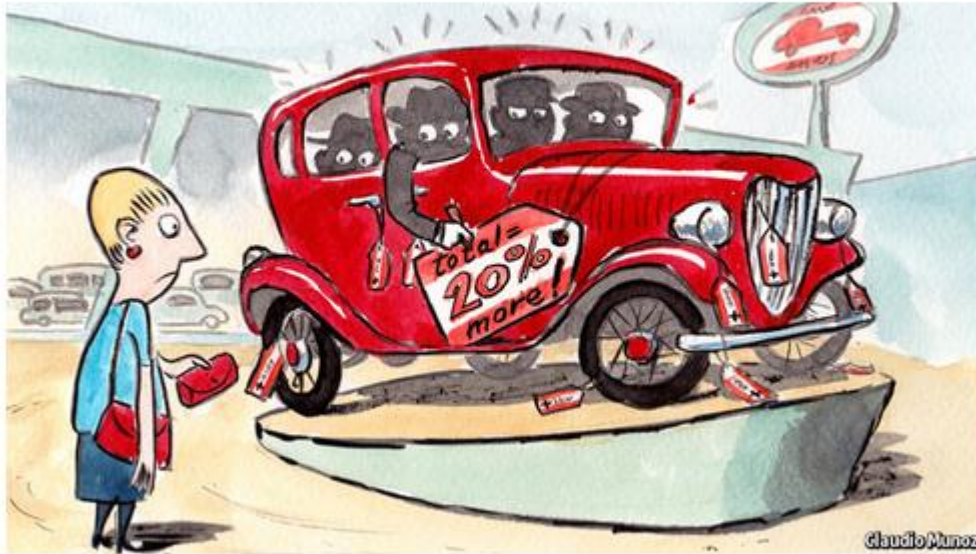
“The digital giants are blowing a Schumpeterian gale through our economies....

But it must be remembered that an economy in the throes of creative destruction needs to be kept on a knife-edge (a precarious place to be, especially during a gale). Markets need to contain enough promise of profit to spur innovation, while being competitive enough to keep strong incentives to continue to innovate and serve customers.”

Competition cases relating to e-Commerce are on the rise

Just one more fix

Trustbusters have got better at detecting cartels and bolder in punishing them. But incentives to fix prices remain strong



From the print edition | Business

Mar 28th 2014 | NEW YORK



“ A growing number of cases are in digital commerce ...”

– The Economist

Source: The Economist, Just one more fix, 28 March 2014

David Topkins – the art seller

On the day after Easter this year, an online poster retailer named David Topkins became the first e-commerce executive to be prosecuted under antitrust law. In a complaint that was scant on details, the U.S. Department of Justice's San Francisco division charged Topkins with one count of price-fixing, in violation of the Sherman Act. The department alleged that Topkins, the founder of Poster Revolution, which was purchased in 2012 by Art.com, had conspired with other sellers between September of 2013 and January of last year to fix the prices of certain posters sold on Amazon Marketplace. Topkins pleaded guilty and agreed to pay a twenty-thousand-dollar fine. "We will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the Internet using complex pricing algorithms," Assistant Attorney General Bill Baer, of the department's antitrust division, said. "American consumers have the right to a free and fair marketplace online, as well as in brick and mortar businesses."



Can algorithms form price-fixing cartels?
Illustration by Boyoun Kim

“...Topkins, the founder of Poster Revolution, which was purchased in 2012 by Art.com, had conspired with other sellers between September of 2013 and January of last year **to fix the prices** of certain posters sold on Amazon Marketplace.”

Source: The New Yorker, When Bots Collude, 25 April 2015

Outline

- **Part 1:** How e-Commerce changes the behavior of businesses and consumers?

- **Part 2:** How does competition assessment change with e-Commerce?
 - a) **Market Definition;** and
 - b) **Market Power Assessment.**

Part 1: E-Commerce and Businesses

- Changes business models
 - ▣ Traditional brick and mortar → click and mortar
 - ▣ Traditional intermediaries are displaced by new intermediaries (e.g., the travel sector)
- Generates cost savings for businesses
- Access to a wider geographic pool of customers



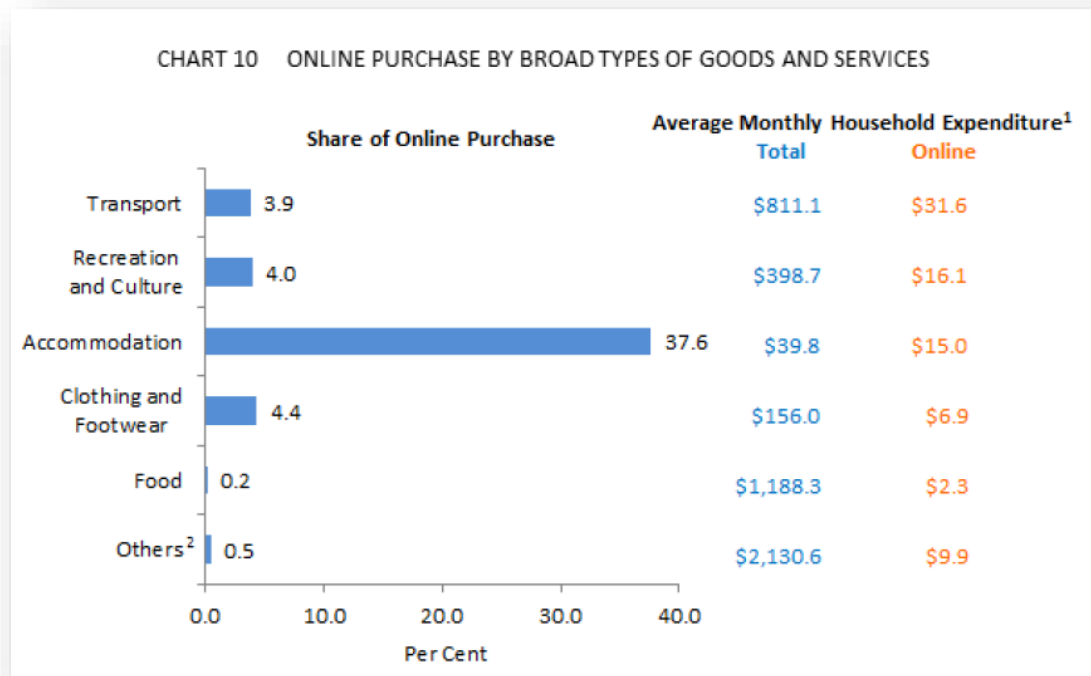
Part 1: E-Commerce and Businesses

- Technologies affords businesses the means to price discriminate
 - ▣ Discrimination by geographic location or by charging lower prices to registered users
- Exhibit network effects, and may favour larger firms.



Part 1: E-Commerce and Consumers

- Level of e-Commerce spending differ across sectors
- Tend to “multi-home”:-
 - ▣ Shopping across online platforms
 - ▣ Shopping online and offline



Source: Department of Statistics Singapore 2015



Part 2(a): Market Definition

- **Two dimensions:**
 - Product Market
 - Geographic Market

- **Hypothetical Monopolist Test (“HMT”) is a conceptual approach used to define markets:**
 - Identifies all the products that buyers regard as reasonably substitutable for the focal product;
 - Identifies all firms that could potentially supply the focal product and substitutes; and
 - Ask whether a hypothetical monopolist controlling a group of focal products can raise prices that are small but significantly above competitive levels.

Part 2(a): Market Definition

HMT

- Hypothetical Monopolist Test (“HMT”)
 - ▣ Remains relevant in the context of an e-Commerce environment.

But...

- ▣ Complicated by the lack of reliable sales and price data in the short term
 - ▣ Complicated by the speed of change in e-Commerce markets
- The dynamic changes in E-Commerce also affects the degree to which competition authorities can rely on past cases when assessing relevant markets

Part 2(a): Market Definition

Product Market Definition

- Standard considerations for the product market definition remains relevant.

- E-Commerce raises the following questions on the definition of the product market:
 - ▣ Does e-Commerce create new markets?
 - ▣ How would price discrimination in an e-Commerce environment affect market definition?
 - ▣ How would the resultant changes in cost structures due to e-Commerce affect market definition?

Part 2(a): Market Definition

Product Market Definition

- **Does e-Commerce create new markets?**
 - Online channels compete with offline channels
 - Online fashion retail versus brick and mortar retailers
 - E-commerce may also support a greater variety of products, and plug gaps in the chain of substitution (e.g., Laundry Box)

 - Online products and services (e.g., comparison-shopping search engines) are new markets.

 - Line between online and offline will become increasingly blurred in the future

Part 2(a): Market Definition

Product Market Definition

- **How would price discrimination in an e-Commerce environment affect market definition?**
 - ▣ The extent to which price discrimination is present in an e-Commerce environment may have the effect of segmenting markets

 - ▣ Price discrimination may occur with geo-blocking and other geographical restrictions

Part 2(a): Market Definition

Product Market Definition

- **How would the resultant changes in cost structures due to e-Commerce affect market definition?**
 - For products such as news services, data services, resultant cost structure may be one whereby the fixed costs are high relative to the marginal costs
 - For such products, companies enjoy savings from increasing its production and/or producing 2 or more distinct goods
 - Suppliers encouraged to enter new market segments, and this facilitate supply side substitutability (and a wider product market definition)

Part 2(a): Market Definition

Geographic Market Definition

- Standard considerations for the geographical market definition remains relevant.
- Key Issue of geography not about the need to travel to the seller
 - ▣ Potential concerns that consumers may have from purchasing from a remote online seller (e.g., shipping costs, delays in delivery fulfilment)
- E-Commerce has the potential to expand the geographical scope of the market
 - ▣ Cost for consumers to visit a website is independent of its geographic location

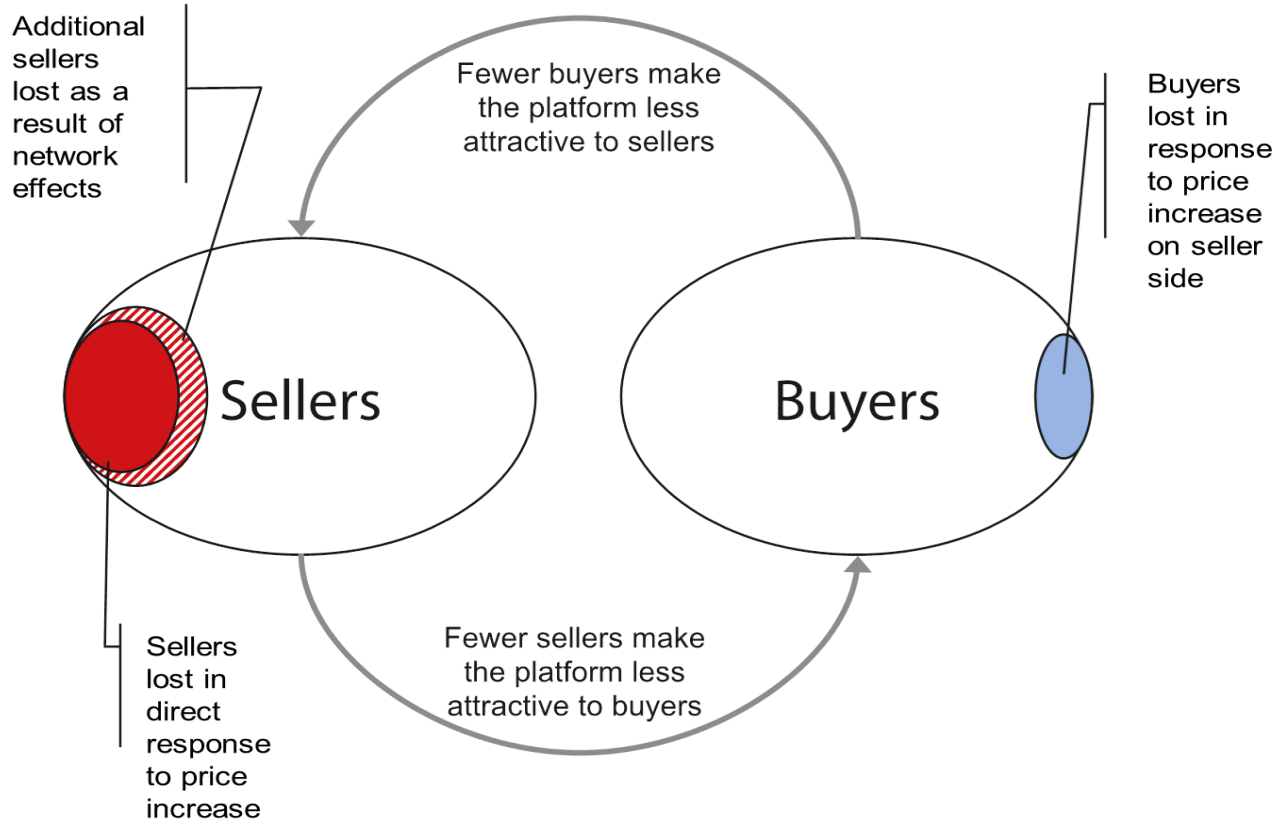
Part 2(a): Market Definition

Multi-sided Platform

Market	Hypothetical Monopolist Test (HMT)
Single Market for the services provided by the platform	<ul style="list-style-type: none">• Relevant price for the application of HMT would be the sum of charges of charges to all users
Separate but interrelated markets	<ul style="list-style-type: none">• Inappropriate to apply a one-sided HMT to define markets• Impact of a price increase by the hypothetical monopolist will need to take into account network effects

Part 2(a): Market Definition

Multi-sided Platform



- ▣ Impact of a price increase on the seller's side by a hypothetical monopolist

Part 2(b): Market Power

- Typically determined using indicators such as:
 - **Market shares:** the extent of existing competition
 - **Barriers to entry and expansion:** the lower the barriers to entry and expansion, the more likely for competitors to restrain the market power that a business has
 - **Buyers' power:** the stronger the buyers' power, the more likely for buyers to constrain the market power that a business has

Part 2(b): Market Power

Market Shares

- **Traditional measures** of market shares such as sales revenue, volume may be inadequate when assessing multi-sided markets
 - For example, when services are provided for free for certain groups of users or where capacity is not an important feature of the market
- **Alternative measures** of market shares for online activities may be considered
 - E.g., the total number of buyers and sellers that connect to the platform, revenue derived from each user group

Part 2(b): Market Power

Market Shares

□ Interpreting Market Shares

- Magnitude of market shares, by themselves, are not necessarily a reliable guide to measuring market power

- Volatile historic market shares may reflect that no player in the market has market power

- Relative market shares may be an important measure
 - For example, persistently high market shares vis-à-vis competitors with very low market shares may be more indicative of market power of an online platform having an entrenched market position due to network effects

Part 2(b): Market Power

Barriers to Entry and Expansion

- **Differences in the analysis of barriers to entry and expansion in the context of e-Commerce**
 - Barriers to entry may be low due to low costs of setting up a new online marketplace

 - Barriers to expansion may be high due to the existence of network effects

Part 2(b): Market Power

Barriers to Entry and Expansion

□ Cost of entry

- Effect of e-Commerce on cost of entry is ambiguous
- Entering the online market remove the need for physical retail space (as opposed to brick-and-mortar store)
- But, businesses face significant costs when investing in advertising, end-to-end logistics networks.

□ Network effects

- The existence of strong network effects, such that the market “tips” in favour of an incumbent may mean that competition becomes for the market (e.g., Facebook, Google)

Part 2(b): Market Power

Buyers' power

- Greater scope for entrants to enter the market and restrain the market power when customers multi-home (e.g. B2C platform) but...
 - ▣ Online platforms may introduce barriers to switching (e.g., loyalty discounts and rebates) so as to disincentivize customers to multi-home)
 - ▣ Customers may be ill-informed about alternatives

Conclusion

- Fundamental steps in market definition and market power assessment are applicable under the e-Commerce environment.
- E-Commerce is likely to present practical challenges to competition assessments by relevant authorities.
 - ▣ Detailed application of competition assessments may require adjustments
- Possible extensions to our study include empirical research based on actual competition cases

Key References

- DotEcon, “E-Commerce and its impact on competition policy and law in Singapore”, October 2015
- EU DG Comp’s e-Commerce Sector Inquiry report, September 2016
- Office of Fair Trading, E-Commerce and its Implications for Competition Policy, Discussion Paper 1, August 2000.